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No. 87-986

In the Supreme Court of the United States

OCTOBER TERM, 1987

DONALD DOUGLAS BREIER, PETITIONER

v.

~~TO BE~~ PRINTED UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General

WILLIAM F. WELD
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

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QUESTION PRESENTED

Whether convictions under 18 U.S.C. (1982 ed.) 922 for unlicensed dealing in firearms should abate in light of the Firearms Owners' Protection Act, Pub. L. No. 99-308, 100 Stat. 449.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 6a-15a) is reported at 813 F.2d 212.

JURISDICTION

The judgment of the court of appeals was entered on March 16, 1987. A petition for rehearing was denied on September 16, 1987. On November 9, 1987, Justice O'Connor granted an extension of time, until December 15, 1987, for filing a petition for a writ of certiorari, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was convicted on five counts of unlicensed dealing in firearms, in

violation of 18 U.S.C. (1982 ed.) 922(a)(1). The district court sentenced petitioner to 45 days' imprisonment, five years' probation, and a $5,000 fine. The court of appeals affirmed.

1. Petitioner is a gun collector. During the summer of 1984, he began renting tables at gun shows, where he bought, sold, and traded firearms. In April 1985, he was contacted by an agent of the Bureau of Alcohol, Tobacco and Firearms (ATF). The agent told petitioner that ATF had reason to believe he was trading in firearms on a regular basis and warned him that a federal firearms license is required for persons who regularly traffic in firearms. Petitioner assured the agent that he was only a collector and that he was not regularly trading in firearms. Over the next year and a half, however, ATF agents attended several gun shows in an undercover capacity and purchased firearms from petitioner; petitioner realized a gross profit on those sales, although he claimed to have suffered a net loss, because of associated expenses, on his overall dealings. In February 1986, a grand jury indicted petitioner on five counts of violating the Gun Control Act of 1968, 18 U.S.C. (1982 ed.) 922(a)(1), which made it unlawful "for any person, except a * * * licensed dealer, to engage in the business of * * * dealing in firearms." Pet. App. 7a.

A jury trial commenced on April 1, 1986 (Pet. App. 7a). At the close of the evidence, the case was submitted to the jury with instructions that the term "dealer" in 18 U.S.C. (1982 ed.) 922(a)(1) meant " 'any person engaged in the business of selling firearms * * * at wholesale or retail.' " Pet. App. 9a n.1 (quoting 18 U.S.C. (1982 ed.) 921(a)(11)(A)), and that the phrase "engage[d] in the business of dealing in firearms" in 18 U.S.C. (1982 ed.) 922(a)(1) meant that the defendant "h[e]ld [himself] out as a source of firearms, or * * * engage[d] in regular and

repeated buyings and/or sellings of firearms, as opposed to an isolated or occasional transaction," even if the defendant did not sell firearms as his primary business or actually realize a profit from his sales (Pet. App. 9a n.1).[1] The jury convicted petitioner on all five counts and, on May 11, 1986, the court imposed sentence (Pet. App. 7a-8a).

2. On May 19, 1986, a few days after petitioner was sentenced, Congress enacted the Firearms Owners' Protection Act (FOPA), Pub. L. No. 99-308, 100 Stat. 449. The FOPA did not change the offense set forth in 18 U.S.C. (1982 ed.) 922(a)(1) or the definition of "dealer" set forth in 18 U.S.C. (1982 ed.) 921(a)(11)(A). Rather, it added a new subsection 21(C) to 18 U.S.C. 921 and thereby redefined the phrase "engaged in the business" to refer to a person who "deal[s] in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms" (§ 101(6), 100 Stat. 450).[2] The FOPA also added a new subsection 22 to 18 U.S.C. (1982 ed.) 921, which

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[1] That instruction was consistent with the construction of Section 922 uniformly embraced by the courts of appeals. See, *e.g.*, *United States* v. *Carter*, 801 F.2d 78, 82 (2d Cir.), cert. denied, 479 U.S. 1012 (1986); *United States* v. *Burgos*, 720 F.2d 1520, 1527 n.8 (11th Cir. 1983); *United States* v. *Wilmoth*, 636 F.2d 123, 125 (5th Cir. 1981). See also *United States* v. *Powell*, 513 F.2d 1249, 1250 (8th Cir.), cert. denied, 423 U.S. 853 (1975).

[2] Section 921(a)(21)(C) (18 U.S.C. (Supp. IV)) provides that the term "engaged in the business" means:

> [A]s applied to a dealer in firearms, as defined in section 921(a)(11)(A), a person who devotes time, attention, and labor to dealing in firearms as a regular course of trade or business with the principal objective of livelihood and profit through the repetitive purchase and resale of firearms, but such term shall not include a person who makes occasional sales, exchanges, or purchases of firearms for the enhancement of a personal collection or for a hobby, or who sells all or part of his personal collection of firearms.

defined the phrase "with the principal objective of livelihood and profit" to mean that the intent was "predominantly one of obtaining livelihood and pecuniary gain" (§ 101(6), 100 Stat. 450).[3] And Section 110 of the statute provided that, with a few specific exceptions, the provisions of the FOPA, including new subsections 21(C) and 22, would take effect 180 days after their enactment—*i.e.*, on November 15, 1986. 100 Stat. 460-461.[4]

3. On appeal, petitioner argued that recently enacted subsections 21(C) and 22 should be applied retroactively to his case and, accordingly, that his convictions should be reversed (Pet. App. 7a). The court of appeals rejected that argument and affirmed petitioner's convictions (*id.* at 6a-15a).

The court began by noting (Pet. App. 10a) that subsections 21(C) and 22 are not included among the list of provisions that the FOPA expressly made retroactive. In spite

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[3] Section 921(a)(22) (18 U.S.C. (Supp. IV)) provides, in pertinent part:

> The term "with the principal objective of livelihood and profit" means that the intent underlying the sale or disposition of firearms is predominantly one of obtaining livelihood and pecuniary gain, as opposed to other intents, such as improving or liquidating a personal firearms collection. * * *

[4] Specifically, Section 110 provides, in pertinent part:

> (a) IN GENERAL.—The amendments made by this Act shall become effective one hundred and eighty days after the date of the enactment of this Act. * * *
>
> (b) PENDING ACTIONS, PETITIONS, AND APPELLATE PROCEEDINGS.—The amendments made by sections 103(6)(B), 105, and 107 of this Act [which affect 18 U.S.C. 923(f), 925, and 926A] shall be applicable to any action, petition, or appellate proceeding pending on the date of the enactment of this Act.
>
> (c) MACHINEGUN PROHIBITION.—Section 102(9) shall take effect on the date of the enactment of this Act.

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of that omission, petitioner argued that those provisions should be given retroactive application so that they would apply to conduct that was governed by the prior version of Section 921 at the time the conduct occurred. In making that argument, the court of appeals observed, petitioner "faces the formidable obstacle of the federal savings clause, 1 U.S.C. § 109" (Pet. App. 10a). That statute provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." The court determined that Congress enacted the saving clause in order " 'to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of "all prosecutions which had not reached final disposition in the highest court authorized to review them" ' " (Pet. App. 11a (citations omitted)). And it found that, "[a]lthough the savings clause on its face applies to the 'repeal of any statute,' it has been held to apply to statutory amendments as well" (*ibid.*). Accordingly, the court concluded that "the determinative question is whether the repealed prohibition is a 'penalty, forfeiture, or liability' saved from extinguishment by 1 U.S.C. § 109" (Pet. App. 12a).

The court determined that new subsections 21(C) and 22 of the FOPA repealed a "liability" to which petitioner previously was subject (Pet. App. 13a). The court then noted that "Congress * * * included a provision in the 1986 Act specifying which sections were to have retroactive effect and the sections in question here were not included in that list." The omission of the amendments to Section 922 from the list of provisions that were meant to

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have retroactive effect, the court held, "precludes the finding of an implied congressional intent of retroactivity" and "returns us to [section] 109, which directs that the guilt of [petitioner] be measured by 18 U.S.C. § 922(a)(1), with its accompanying judicial construction, as it stood prior to the effective date of the 1986 Act" (Pet. App. 13a). The court added that "[t]he legislative history of the 1986 Act shows that Congress was well aware of the judicial interpretations of the term 'engaged in the business' " and that it enacted new subsections (21)(C) and (22) "in order to limit the conduct deemed to be criminal" (Pet. App. 13a (footnote omitted)). Congress, the court concluded, must be presumed to be familiar with the general saving clause, and if Congress had intended to have the new subsections affect conduct occurring prior to the effective date of the amendments, it would have so indicated (*ibid.*).

4. Judge Noonan initially concurred in the court of appeals' judgment; while he did not believe that the FOPA amendments addressed a "liability" within the meaning of 1 U.S.C. 109, he did find it to be "the express intent of Congress to make the amendments to [FOPA] * * * effective only 180 days after the enactment of the law" (Pet. App. 15a). On petition for rehearing, however, Judge Noonan reassessed that conclusion and determined that, notwithstanding the explicit provision delaying their effective date, the FOPA amendments should be applied retroactively to petitioner's case. The retroactive application of those provisions of the FOPA was necessary, Judge Noonan concluded, in order to promote Congress's objective of correcting prior ATF enforcement policies with which Congress disagreed (*id.* at 4a-5a).

ARGUMENT

1. The decision of the court of appeals is correct. The general saving clause states that the repeal of a statute does not "release or extinguish any * * * liability" under that statute "unless the repealing Act shall so expressly provide" (1 U.S.C. 109). The amendments to Section 921 are subject to the general saving clause because they altered the definition of the activity made criminal by 18 U.S.C. (1982 ed.) 922 and thereby affected the "liability" of persons subject to the statute. See generally *Warden* v. *Marrero*, 417 U.S. 653, 661-664 (1974); *Pipefitters* v. *United States*, 407 U.S. 385, 434-435 (1972). Moreover, as the court of appeals noted (Pet. App. 10a), the "repealing Act" does not "expressly provide" that the new provisions relating to firearms dealers should be given retroactive effect. On the contrary, Section 110 of the FOPA expressly provides that the FOPA amendments would take effect only 180 days after their enactment. While certain provisions of the FOPA were given retroactive application "to any action, petition, or appellate proceeding pending on the date of the enactment of this Act," the amendments to Section 921 were not included among them. This omission is strong if not conclusive evidence that Congress did not intend the amendments to Section 921 to apply retroactively and thereby to override the effect of the general saving provision. See generally *Omni Capital International, Ltd.* v. *Rudolf Wolff & Co.*, No. 86-740 (Dec. 8, 1987), slip op. 9.

2. Nor is there any dispute among the courts of appeals concerning whether the amendments to Section 921 should apply retroactively. The only other court of appeals to address the issue has also held that the "firearms dealer" provisions of the FOPA are not to be given retroactive effect. *United States* v. *Carter*, 801 F.2d 78, 83

(2d Cir.) ("retrospectivity is plainly contrary to Congress's intent"), cert. denied, 479 U.S. 1012 (1986); see also *United States* v. *Jackson*, 824 F.2d 21, 22-23 & n.2 (D.C. Cir. 1987); *United States* v. *Pennon*, 816 F.2d 527, 529 (10th Cir. 1987). And, contrary to petitioner's suggestion (Pet. 5-8), the decision in this case does not conflict with the decision of the Eleventh Circuit in *United States* v. *Orellanes*, 809 F.2d 1526 (1987).

In *Orellanes*, the defendant was charged with receiving firearms and ammunition, in violation of 18 U.S.C. (1982 ed.) 922(h)(1). The charges were based on Orellanes's purchases of firearms and ammunition between 1982 and 1985, after he had pleaded guilty to two felonies in Florida state court. The defendant argued (1) that his convictions abated on the date the FOPA became effective; (2) that because the Florida court had entered an order withholding adjudication after his guilty plea, he was not a "convicted" felon within the meaning of 18 U.S.C. (1982 ed.) 922(h)(1); and (3) that this Court's decision in *Dickerson* v. *New Banner Institute, Inc.*, 460 U.S. 103 (1984), holding that a guilty plea is a conviction for purposes of Section 922(h)(1), even if it is not accompanied by an adjudication of guilt, should not be applied retroactively to his case.

The court of appeals rejected each of those arguments and affirmed Orellanes's conviction. With respect to the abatement argument, the court held that the general saving clause, 1 U.S.C. 109, prevented the prosecution from abating at the time the FOPA became effective, particularly since the FOPA "contains no provision precluding the retention of accruing penalties" (809 F.2d at 1529). With respect to the meaning of the term "convicted," the court held that, even under Florida law, a plea of guilty constitutes a conviction, even in the absence of an adjudication by the court (801 F.2d at 1528). And, finally, with

respect to the challenge to the application of *Dickerson*, the court held that *Dickerson* was fully applicable to petitioner's conduct (809 F.2d at 1528).

Petitioner does not claim that the decision below conflicts with any of those three holdings by the court in *Orellanes*. Rather, he relies on the court's reference to the FOPA in the course of its discussion of Florida law—specifically, its notation that Section 101(5) of the FOPA statutorily overruled the decision in *Dickerson* and requires a court to look to state law in determining whether a guilty plea constitutes a conviction (809 F.2d at 1528). But because Orellanes was considered "convicted" under both state and federal law, the Eleventh Circuit did not have to decide whether Section 101(5) of the FOPA would have applied retroactively to relieve the defendant of liability for the firearms offenses he committed prior to the effective date of the Act. Thus, the decision in this case does not conflict with the decision in *Orellanes*; at most, the decision in this case is contrary to an unarticulated premise of a portion of the opinion in *Orellanes*, a premise that was unnecessary to the court's judgment.[5]

Moreover, the internal inconsistencies in the Eleventh Circuit's opinion in *Orellanes* make it unclear whether that court would have reached a different result from the court below on the facts of this case. The court in *Orellanes* suggested both that the FOPA provided the governing definition of the term "convicted" and that the *Dickerson* case was applicable to Orellanes's conduct; but the term "convicted" cannot draw its meaning from state and federal law at the same time. Similarly, the *Orellanes* court sug-

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[5] We note, in addition, that *Orellanes* dealt with a different section of the Gun Control Act. *Orellanes* involved the "prior conviction" provision, 18 U.S.C. (1982 ed.) 922(h)(1), while this case involves the "firearms dealer" provision, 18 U.S.C. (1982 ed.) 922(a).

gested that both Section 101(5) of the FOPA and the general saving clause, 1 U.S.C. 109, controlled the case; but a statute cannot be both retroactive and nonretroactive at the same time.[6] These internal inconsistencies indicate that the Eleventh Circuit's discussion of Section 101(5) of the FOPA cannot properly be used as the basis for an asserted conflict among the circuits.

Finally, even if some of the language in *Orellanes* can be read as implying that Section 101(5) of the FOPA is to be applied retroactively, review by this Court is unwarranted because of the diminishing importance of the issue. The question whether the FOPA amendments should be given retroactive application has arisen in only a small number of cases under the Gun Control Act and, in light of the passage of time since the FOPA amendments were enacted in 1986, it is not likely to arise in many more. As we have shown, the Ninth Circuit's application of the general saving clause was clearly correct, and only the rather cryptic language from a portion of the *Orellanes* case stands on the other side. Because that language has not caused confusion among other courts—and did not even result in an incorrect outcome in the *Orellanes* case itself—this Court's intervention is not warranted.

3. Petitioner next contends (Pet. 8-17) that this Court's decisions do not establish a clear "analytical proc-

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[6] The confusion in the opinion of the *Orellanes* court may have resulted from that court's focus on the term "penalty" in the general saving clause. While recognizing that the general saving clause preserves "any penalty" established in a prior statute, the court may have overlooked that the saving clause also preserves any "liability" established in a prior statute, absent an express provision to the contrary in the repealing or amending statute. If the general saving clause is applicable to the FOPA amendments, as the *Orellanes* court held it was, the result is the preservation of a liability—in this case, the preservation of petitioner's liability for trading in firearms without a license, as that term was defined prior to the FOPA amendments.

ess" for the federal courts to follow in applying 1 U.S.C. 109 and that the lower courts need guidance concerning the effect that the general saving provision has on an amending statute such as the FOPA. This contention is without merit.

The principles governing the abatement of criminal prosecutions are, in fact, relatively clear. The common law rule provided that a prosecution under a statute that is repealed or amended while the case is pending on direct review must abate in the "absence of a demonstration of contrary congressional intent or a general saving statute." *Pipefitters* v. *United States*, 407 U.S. 385, 432 (1972). See also *Warden* v. *Marrero*, 417 U.S. 653, 660 (1974); *United States* v. *Reisinger*, 128 U.S. 398, 401 (1888). The general saving clause is such a statute; it was enacted to abolish the common law presumption that the repeal of a criminal statute resulted in the abatement of all prosecutions that had not yet become final. *Warden* v. *Marrero*, 417 U.S. at 660-661 & n.11; *Pipefitters* v. *United States*, 407 U.S. at 433. The general saving clause does not create an inflexible rule that no repealing or amending statute can be given retroactive effect; instead, it creates a presumption in favor of nonretroactivity, which can be overridden if Congress has indicated a desire to make a particular statute—or certain provisions of a statute—retroactive. See *Hertz* v. *Woodman*, 218 U.S. 205 (1910); *Great Northern Ry.* v. *United States*, 208 U.S. 452, 464-466 (1908).

Petitioner suggests that *Hamm* v. *City of Rock Hill*, 379 U.S. 306 (1964), is inconsistent with this analysis. In *Hamm*, the Court held that state prosecutions of persons who had participated in "sit-in" demonstrations at retail store lunch counters had to abate because of the subsequent enactment of the Civil Rights Act of 1964. In the course of its discussion, the Court stated (379 U.S. at 314) that, if the "sit-in" convictions had been federal convic-

tions, they would not have been saved from abatement by the general saving clause. The Court held that the effect of the Civil Rights Act went far beyond merely repealing prior contrary laws—instead, the Act "substitutes a right for a crime" (*ibid.*). That "drastic * * * change" in the law, the Court stated, "is well beyond the narrow language of amendment and repeal." Therefore, the Court concluded, the effect of the Civil Rights Act was to go beyond the "mere technical abatement" that the saving clause was meant to avoid (*ibid.*).

Unlike the Civil Rights Act of 1964, the FOPA amendments were not intended to "substitute[] a right for a crime"; they merely removed certain categories of conduct from the reach of the criminal sanction—the same effect that any repeal of a criminal statute would have. The Court's analysis in *Hamm* is therefore inapplicable here. Moreover, the Court in *Hamm* was applying a statute that did not contain a powerful guide to statutory construction of the kind that was available to the court of appeals in this case: Section 110 of the FOPA, which indicates that certain provisions of the FOPA would be applied retroactively to cases on appeal at the time of enactment, but which did not include the provisions at issue in this case.

Later decisions by this Court have made clear that the *Hamm* case was not intended to mark a departure from the Court's traditional construction of the general saving clause and its relationship to statutes that repeal or amend criminal sanctions. In *Pipefitters* v. *United States, supra,* for example, the Court addressed the question whether a prosecution for illegal campaign contributions under 18 U.S.C. (1970 ed.) 610 was affected when the statute was amended by Section 205 of the Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 10. The Court found no evidence that Congress intended the 1971 statute

to preserve prosecutions under the former version of Section 610; nonetheless, the Court held that the general saving clause barred the abatement of any prosecutions under the prior version of Section 610. 407 U.S. at 432-433. The Court distinguished the *Hamm* case by pointing out that, although Section 205 of the Federal Election Campaign Act of 1971 may have "ma[d]e lawful what was previously unlawful," it did not "[substitute] a right for a crime." 407 U.S. at 434. Therefore, the Court held that, even if the former Section 610 was implicitly repealed by the 1971 statute, the defendants remained punishable under the prior version of Section 610.

Two years later, in *Warden* v. *Marrero, supra*, the Court again applied the general saving clause to preserve a penalty that had been repealed by a statute that was enacted after the defendant's conviction. In that case, the Court held that the general saving clause preserved the no-parole provision of the pre-1970 narcotics laws, 26 U.S.C. (1964 ed.) 7237(d), as applied to the defendant, even though that provision was repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236. Because there was no indication in the latter statute that the repeal of the no-parole provision was meant to be applied retroactively, and because the Court concluded that the no-parole provision of the former statute was a "penalty" within the meaning of 1 U.S.C. 109, the Court held that the defendant was not entitled to relief based on the later statute.[7]

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[7] Although the decision in *Warden* v. *Marrero, supra*, drew a dissent, the analysis adopted by the dissenters supports the position taken by the Ninth Circuit in this case. The dissenters accepted the basic proposition that "apart from exceptional circumstances [citing *Hamm* v. *Rock Hill, supra*], one who violates the criminal law should not escape sanction if, subsequent to the commission of his criminal act, the law

The decisions in *Pipefitters* and *Warden* v. *Marrero* control this case. Like the amending statute at issue in *Pipefitters*, the FOPA amendments merely "ma[d]e lawful what was previously unlawful"; they did not substitute "a right for a crime." 407 U.S. at 434. Moreover, as in both *Pipefitters* and *Warden* v. *Marrero*, there is nothing in the FOPA to indicate that Congress intended the amendments to Section 921 to apply retroactively; on the contrary, as we have noted, there is a strong textual basis for the inference that those amendments were not intended to have retroactive application. Petitioner committed an act which, at the time, was clearly criminal. Indeed, even though he had been warned by an ATF agent that his conduct was criminal, he persisted in it. He should not receive a windfall from Congress's subsequent decision to decriminalize certain kinds of firearms transactions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
THOMAS E. BOOTH
Attorney

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happens to be repealed." *Warden* v. *Marrero*, 417 U.S. at 665 (Blackmun, J., dissenting).

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